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Supreme Court of the United States

October Term, 1943. No. 691

**THE PENNSYLVANIA COMPANY FOR INSURANCES
ON LIVES AND GRANTING ANNUITIES, Trustee**
Under Trust Agreement Dated August 9, 1933, as Supple-
mented, With CAPITAL SAVINGS PLAN, INC., and the
Holders of the Contract Certificates Issued Thereunder,

Petitioner,

v.

UNITED STATES OF AMERICA.

October Term, 1943. No. 692

**THE PENNSYLVANIA COMPANY FOR INSURANCES
ON LIVES AND GRANTING ANNUITIES, Trustee**
Under Trust Agreement Dated July 15, 1935, With WEL-
LINGTON FOUNDATION, INC., and the Holders of the
Certificates Issued Thereunder,

Petitioner,

v.

UNITED STATES OF AMERICA.

**PETITION FOR WRITS OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT.**

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IN THE
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October Term, 1943. No. .

THE PENNSYLVANIA COMPANY FOR INSURANCES
ON LIVES AND GRANTING ANNUITIES, TRUSTEE
UNDER TRUST AGREEMENT DATED AUGUST 9, 1932, AS
SUPPLEMENTED, WITH CAPITAL SAVINGS PLAN,
INC., AND THE HOLDERS OF THE CONTRACT CERTIFICATES
ISSUED THEREUNDER,

Petitioner,

v.

UNITED STATES OF AMERICA.

October Term, 1943. No. .

THE PENNSYLVANIA COMPANY FOR INSURANCES
ON LIVES AND GRANTING ANNUITIES, TRUSTEE
UNDER TRUST AGREEMENT DATED JULY 15, 1935, WITH
WELLINGTON FOUNDATION, INC., AND THE HOLD-
ERS OF THE CERTIFICATES ISSUED THEREUNDER,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRITS OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT.

*To the Honorable, the Chief Justice and the Associate Jus-
tices of the Supreme Court of the United States:*

The petitioner, as trustee under the respective trust
agreements above mentioned, respectfully prays that writs
of certiorari issue to the United States Circuit Court of Ap-
peals for the Third Circuit to review the judgments and de-
cisions of that court entered in these cases on November 16,

1943 affirming judgments of the District Court of the United States for the Eastern District of Pennsylvania.

Opinions Below.

The opinions of the United States District Court for the Eastern District of Pennsylvania (R. 30 and 61) are reported at 48 F. Supp. 873 and 48 F. Supp. 875. The Circuit Court of Appeals for the Third Circuit filed one opinion covering both cases (R. 65) which is reported at 138 Fed. (2d) 869.

Jurisdiction.

Jurisdiction to issue the writs prayed for is vested in this Court by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938, U. S. C., Title 28, Section 347). The judgments of the United States Circuit Court of Appeals for the Third Circuit to be reviewed were entered November 16, 1943. (R. 75-76)

Statement of Questions Involved.

1. Were the trusts involved in these cases, which are of type commonly known as periodic payment plan trusts, properly classified as associations for federal tax purposes?
2. Were these trusts created and maintained for the purpose of holding and conserving property with incidental powers or for the purpose of carrying on business enterprises and sharing their gains?
3. Is the purpose for which trusts were created and maintained the primary test or do the tests of corporate advantages and corporate resemblances control?
4. Did the Circuit Court construe the word "associations" in the Revenue Acts and Internal Revenue Code in its ordinary and literal sense or did it extend its meaning beyond the clear import of the language used?

Statutes Involved.

The Statutes involved are Section 1001 (a) (2) of the Revenue Act of 1936 (49 Stat. 1756, U. S. C. A., Title 26, Internal Revenue Acts, page 971) and Section 901 (a) (2) of the Revenue Act of 1938 (52 Stat. 583, U. S. C. A., Title 26, Internal Revenue Acts, page 1161), which read:—

“(a) When used in this Act—

* * * * *

“(2) The term ‘corporation’ includes associations, joint stock companies, and insurance companies”.

In the Wellington case there is also involved Section 3797 (a) (3) of the Internal Revenue Code (53 Stat. 469, U. S. C. A., Title 26, Section 3797 (a) (3)), which reads:—

“(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

* * * * *

“(3) Corporation. The term ‘corporation’ includes associations, joint stock companies, and insurance companies”.

Statement of Matter Involved.

These cases are suits instituted by the petitioner, a Pennsylvania trust company, as trustee under two trust agreements, to recover refunds of federal capital stock and corporate income taxes paid pursuant to a ruling (R. 26) of the Commissioner of Internal Revenue that certain trusts administered by it were associations.

The ruling applied to thirteen trusts, of a type generally known as “periodic payment plan trusts”. Eleven suits against the respondent were instituted in the District Court for the Eastern District of Pennsylvania. These two cases were selected for trial as typical cases to test the validity of the ruling.

The taxes which the petitioner sought to recover in its complaints were:— in the case of the Capital trust, corporate income and excess profits taxes and undistributed profits surtax for the calendar year 1936, corporate income taxes for the calendar year 1937, and capital stock taxes for the years 1935, 1936, 1937 and 1938; and in the case of the Wellington trust, capital stock taxes for the years 1937, 1938, 1939 and 1940 and corporate income tax for the calendar year 1940.

The facts were stipulated. (R. 2, 38) The Appendix filed with the Circuit Court, which is part of the printed record before this Court, contained the stipulations of fact exclusive of the trust agreements. (R. 12, 47) These were furnished to the Circuit Court at the argument in an exhibit book which has been certified to this Court as part of the unprinted record. For the convenience of this Court the petitioner has printed in an appendix hereto annexed, the Capital trust agreement complete with exhibits and supplements, the important portions of the Wellington trust agreement and one of the forms of certificate issuable thereunder.

The periodic payment plan is a program designed to enable the so-called "investor" to accumulate a diversified investment through the purchase of the shares of a designated investment trust or investment company. There is issued to the investor a certificate by the acceptance of which he agrees to make regular periodic payments. The most usual program is \$10. a month for ten years. (R. 3, 39) All payments are made to a bank or trust company as trustee. The trustee is authorized to make certain deductions from payments. For instance, in the Capital Plan (R. 4) the authorized deductions are (1) 25¢ for each \$10 payment for the trustee's fee; (2) \$60 to Capital Savings Plan, Inc., the sponsoring company, deducted from the first twelve monthly payments or such of them as it should direct; and (3) in case the investor elects to subscribe for

a certificate with insurance benefits, his share of the premiums payable under a group life insurance policy insuring his life in the amount of his unpaid payments, so that in case of his death the insurance may be collected and his certificate may become fully paid.

After the trustee has made the authorized deductions it invests the balance in the shares which are to be purchased under the plan. (R. 4, 40) It keeps a separate account for each investor in which it notes the exact amount of shares calculated to the third decimal place which it purchases each time with the investor's money, and a share balance carrying forward the total number of shares purchased and held for each investor at any one time. (R. 13, 49)

When the investor has completed his payments, he may require the trustee to hold his trust shares for him for an additional period of ten years in the case of Capital plan, and until the expiration of 25 years from the date of his certificate in the case of the Wellington plan. (R. 68) An investor may also subscribe for a fully paid plan, in which event, he makes one large initial payment. The investor can compel the trustee to administer a Capital fully paid plan for ten years and a Wellington fully paid plan for twenty-five years.

Neither the trustee nor the sponsoring company may terminate a plan unless (1) the investor under the periodic payment plan becomes delinquent in making his payments (R. 68) or (2) until the expiration of the various periods for which the plans must be administered. The investor, on the other hand, has the right at any time to terminate his plan and receive his trust shares or the proceeds thereof. (R. 5, 42) He may also make periodic partial withdrawals from time to time of his shares or the proceeds thereof. (R. 6, 42)

The shares purchased from time to time for the investors are held by the trustee registered in its name or in

the name of its nominee. (R. 6, 43) The trustee receives from time to time regular semi-annual or quarterly distributions or dividends on the shares, and either reinvests them in additional shares for each investor or remits them to each investor in accordance with their instructions or the terms of the trust agreements. (R. 5, 41) In the case of the Capital plan the trust agreement provides that the distributions received for investors holding periodic payment plans shall be reinvested, but the trustee with the approval of the sponsoring company in practice has permitted the holders of such plans to elect to receive their distributions in cash. (R. 5) The holder of a fully paid Capital plan may elect either to have his distributions reinvested or to have them remitted to him. In the case of Wellington plan, the dividends received on the shares are distributable to the investors, who have the right to direct that they be reinvested if they so desire. (R. 41)

The trustee maintains a separate income account for each investor (R. 23, 57) on which it notes the investor's share in money of each distribution or dividend received, and where reinvestments are made the number of shares carried to the third decimal place which are purchased for him. The shares purchased are also noted on the master card account kept for each investor and the share balance carried forward as in the case of the investment of payments.

The functions of the trustee are almost entirely ministerial. Its duties and responsibilities are set forth in detail in the trust agreements. The functions of the sponsoring company are to solicit the applications for the plans and to furnish the shares to be purchased thereunder as a dealer in securities. The only powers exercisable by the sponsoring companies or the trustee requiring the exercise of discretion are the powers of substitution of the investment which have never been exercised in either of the trusts. (R. 3, 39)

In the Capital trust the shares designated for purchase are Independence Trust Shares, which are the shares of an investment trust of the fixed or deposited unit type. (R. 69) The sponsoring company under Article VI of the trust agreement (Appendix p. 56) may substitute the shares of a similar fixed investment having reasonably comparable underlying securities, or if such shares are not available or their purchase is impracticable, receipts or certificates of interest issued by banks evidencing the deposit of reasonably comparable underlying securities, if in the judgment of the sponsoring company "such latter investment would be more beneficial to the Investor". The trustee under Sections 2 and 3 of Article VIII (Appendix p. 59) also has the power to substitute like shares, receipts or certificates of interest, if the shares then purchaseable cease to be available for purchase or can be purchased only at unreasonable prices, but the trustee can substitute only for those particular investors who consent in writing within thirty days after notice.

In the Wellington trust the shares designated for purchase are the shares of Wellington Fund, Inc., an incorporated investment company wholly separate and distinct from Wellington Foundation, Inc., the sponsor of the Wellington plans. (R. 69-70) The sponsoring company under Article VI of the trust agreement (Appendix p. 94) may substitute the shares of any investment trust incorporated or unincorporated having a portfolio of securities reasonably comparable to those in the portfolio of Wellington Fund, Inc., or in case such shares are not available or their purchase impracticable, such other shares as in the opinion of the sponsoring company will supply the investors with shares of reasonable security and income producing characteristics. If any substitution is made the investors are to be notified and are to have thirty days to dissent by terminating their plans. The trustee also has a power of substitution under Section 6.04 (Appendix p. 96), if the sponsoring company does not furnish an adequate source from

which shares can be purchased and does not substitute other shares, but here again the trustee cannot substitute as to any investor who does not consent in writing within thirty days.

Except in the very remote contingency under the Wellington plan that the trustee may become incapable of acting, it cannot resign its trusteeship under any plan once the certificate has been issued, nor can it be removed. (R. 68) The trustee keeps only such accounts as are necessary to administer the plans on a cash basis. (R. 8, 45) It keeps no capital or income account for the trusts as a whole. (R. 9, 46) The trusts have no office stationery, no minute books, and no seals, nor have the trusts any employees, officers or directors. There are no provisions in the trust agreements for meetings of the investors and no such meetings have ever been held. The investors have no voting rights with respect to the administration of the trusts. (R. 9, 46)

The District Court (R. 30, 61) held that the trusts were associations, and entered judgments for the respondent. (R. 35, 62) Upon appeal the Circuit Court also held the trusts were associations (R. 65), and affirmed the judgments of the District Court. (R. 75, 76)

Reasons Relied on for Allowance of Writs.

I. The Circuit Court has decided these cases in conflict with decisions of this Court in *Morrissey v. Commissioner*, 296 U. S. 344, and companion cases:

In the *Morrissey* case this Court adopted as the primary test to determine whether a trust is an association for federal tax purposes, that the trust must have been created and maintained as "a joint enterprise", or as "an enterprise for the transaction of business" (p. 356), or to provide "a medium for the conduct of a business and sharing its gains" as distinguished from an object "to hold and conserve particular property, with incidental powers". (p. 357) "The nature and purpose of the co-operative

undertaking will differentiate it from the ordinary trust." (p. 357)

The Circuit Court applied as the primary test, "the similarity of the benefits and privileges enjoyed by virtue of the trust when compared with those afforded by the use of the corporate forms". (R. 72) It also held that five attributes of corporate organization mentioned by this Court in the *Morrissey* case, were sufficient of themselves to characterize a trust as an association, viz. (1) a continuing entity to hold title, (2) centralized management, (3) security from termination by death of the beneficial owners, (4) facilitation of transfer and the introduction of large numbers of participants and (5) limited liability. (R. 72)

This Court in the *Morrissey* case did not intend that corporate resemblances should be a primary test. The five attributes were mentioned merely to illustrate features which are to be found in trusts as well as in corporation. Attributes 3 and 4 were mentioned as distinguishing features as between partnerships on the one hand and trusts and corporations on the other hand.

The Circuit Court also erroneously found that all five attributes were present in the trusts here involved. Attributes 2 (central management) and 5 (limited liability) were not present in the sense this Court intended in the *Morrissey* case. It is also doubtful whether attribute 1 (a continuing entity to hold title) is present in the sense contemplated.

The tests applied by the Circuit Court lead to the classification of a trust as an association for technical and superficial reasons and avoids the basic question of whether the trust is an association in the literal and ordinary sense; whether it really is a "business trust". The petitioner will expand its argument under this heading in its brief, and will cite well reasoned decisions of other Circuit Courts and lower federal courts which correctly apply the primary test of the *Morrissey* case.

II. The Circuit Court has failed to construe the term "associations" in the tax statutes involved in accordance with the rules of statutory construction announced by decisions of this Court.

This Court has held in a number of cases, of which the one most often cited is *United States v. Merriam*, 263 U. S. 179, that taxing statutes are not to be extended by implication beyond the clear import of the language used and that doubt as to the meaning of their words must be resolved against the government and in favor of the taxpayer. It has also held in *Crocker v. Malley*, 249 U. S. 223, that a tax statute should not be construed so as to tax the same income twice unless the intent to do so be clearly expressed.

The Circuit Court stated the question involved to be "whether the trusts under consideration are pure trusts or associations" (R. 66), and defined "pure trusts" as "trusts of traditional pattern where property is conveyed by will, deed, or declaration to a trustee or is to be retained by the settlor on specified trusts for a certain term for the benefit of named or described persons". (R. 71)

Aside from the fact that the trusts here involved come within this definition in most respects, the issue is not whether a trust is a pure trust or an association, or as the respondent argued before the Circuit Court whether all trusts which are not pure trusts must be associations, but whether what is a trust in form and substance must be classed as an "association", using that term in its ordinary and literal sense and without extending its meaning by implication against the interests of the taxpayer.

The fallacy of the Circuit Court's position is demonstrated by the portion of its opinion which points out differences between these trusts and a "traditional trust". (R. 73-74) It stresses the ministerial functions of the trustee which negatives the attribute of central management. It points out that each investor may take down his interest in the trust at any time while the trustee remains help-

less. This negatives the attribute of continuity and is an attribute of revocable trusts which are taxed under Section 166 of the Internal Revenue Code.

The construction of the term "associations" applied by this Court in the *Morrissey* case is the only sound one. The primary test is whether the trust is in reality a business trust; that is a trust created and maintained for the purpose of conducting a business enterprise and sharing its gains. The petitioner will expand its argument under this heading in its brief.

III. The Circuit Court erred in holding that it was not the purpose of the trusts to achieve security and preservation of property.

This finding of the Circuit Court appears at page 74 of the Record. It is without foundation. The very purpose of the trusts is that the trustee shall hold and accumulate shares for each investor for long periods of time, subject to his right to revoke the trust to the extent of his earmarked interest therein, and subject to termination by the trustee only if an investor holding a periodic plan becomes delinquent in his payments. Security is afforded by lodging the investor's shares in the hands of a responsible trust company. The petitioner will expand its argument on this point in its brief.

IV. The Circuit Court failed to hold that the investors were not associates.

This Court stated in the *Morrissey* case (p. 356) that the word "association" implies "associates", and carried the thought forward by constant references to a "joint enterprise" or "common enterprise". The most unusual feature of the trusts in these cases is that in one sense there is a separate trust for each beneficiary. This arises from the fact that the trustee is required to keep a separate account for each investor and to earmark upon its books the exact amount of shares held for each investor. At any one time each investor has a complete equitable in-

terest in a certain number of shares held for him and for no one else. He is concerned only with how the trustee applies his payments and the dividends upon his shares. He is not concerned in the slightest with how the trustee applies the payments or dividends of any other investor.

The petitioner will expand its argument on this point in its brief.

V. The Circuit Court has decided an important question of federal law which has not been, but should be, settled by this Court.

The periodic payment plan trusts administered by the petitioner are not the only trusts in the country which may be affected by the decision of the Circuit Court. An indication of the number of trusts of this type there are through the nation is the fact that 54 periodic payment plans are registered with the Securities and Exchange Commission under the Investment Company Act of 1940, and that approximately 400 investment trusts, investment companies, face amount certificate trusts and periodic payment plans in all are registered with the Commission. The periodic payment plans, therefore, represent a sizeable proportion of the general investment trust field.

At the present time the petitioner administers plans for some 20,000 investors all of whom are adversely affected by the decision of the Circuit Court because it subjects them to double taxation upon the theory that the trusts are separate business entities taxable for federal purposes in the same manner as corporations. Judging from the number of investors for whom the petitioner acts and the number of periodic payment plans registered with the Commissioner, there are undoubtedly many more thousands of members of the investing public who would be likewise affected if the decision were to be universally applied as the law in all circuits.

The same or similar questions are pending in other federal jurisdictions. The petitioner is informed that there are two periodic payment plan trusts trusteeed by the Em-

pire Trust Company, of New York, with large claims for refund, on two of which suits are pending in the United States District Court for the Southern District of New York. An appeal is now pending before the United States Circuit Court of Appeals for the Tenth Circuit (*Commissioner v. The City National Bank and Trust Company, Trustee*) in which the Commissioner is endeavoring to reverse a decision of the Tax Court of the United States holding that a trust which is a combination of a periodic payment plan trust and a fixed investment trust is a trust and not an association.

The question involved is, therefore, important not only to the investors for whom the petitioner acts as trustee, but to holders of periodic payment plans throughout the nation.

WHEREFORE, it is respectfully submitted that this petition for writs of certiorari to review the judgments of the Circuit Court of Appeals for the Third Circuit should be granted.

AND your petitioner will ever pray, etc.

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